2011

Basic Research, LLC, Dynakor Pharmacal, LLC, The Carter-Reed Company, LLC, Zoller Laboratories, LLC, Dennis Gay, Daniel B. Mowrey and Mitchell K. Friedlander v. Admiral Insurance Co : Reply Brief

Utah Court of Appeals

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
Alan C Bradshaw, Aaron C Garrett; Manning, Curtis, Bradshaw & Bednar; David A Gauntlett, James A Lowe, Andrew M Sussman; Gauntlett & Associates; Attorneys for Appellants.
Phillip S Ferguson; Christensen & Jensen; David J Garthe; Boornazian, Jensen & Garthe; Attorneys for Appellee.

IN THE UTAH SUPREME COURT

BASIC RESEARCH, LLC, DYNAKOR PHARMACAL, LLC, THE CARTER-REED COMPANY, LLC, ZOLLER LABORATORIES, LLC, DENNIS GAY, DANIEL B. MOWREY and MITCHELL K. FRIEDLANDER, Plaintiffs/Appellants, v. ADMIRAL INSURANCE COMPANY, a Delaware corporation, Defendant/Appellee.	Case No. 20110556-SC Third District No. 110901154

APPELLANT'S REPLY BRIEF

On Appeal from the Final Judgment of the Third Judicial District Court for Salt Lake County, Honorable L.A. Dever, District Judge

Phillip S. Ferguson
CHRISTENSEN & JENSEN, P.C.
15 West South Temple, Suite 800
Salt Lake City, Utah 84101-1572

David J. Garthe
BOORNAZIAN JENSEN & GARTHE
555 12th Street, Suite 1800
Oakland, CA 94607-4046

Attorneys for Defendant/Appellee

Alan C. Bradshaw
Aaron C. Garrett
MANNING CURTIS BRADSHAW & BEDNAR LLC
10 Exchange Place, 3rd Floor
Salt Lake City, Utah 84111

David A. Gauntlett
James A. Lowe
Andrew M. Sussman
GAUNTLETT & ASSOCIATES
18400 Von Karman, Suite 300
Irvine, California 92612

Attorneys for Plaintiffs/Appellants

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BOORNAZIAN JENSEN & GARTHE
555 12th Street, Suite 1800
Oakland, CA 94607-4046

Attorneys for Defendant/Appellee

Alan C. Bradshaw
Aaron C. Garrett
MANNING CURTIS BRADSHAW & BEDNAR LLC
10 Exchange Place, 3rd Floor
Salt Lake City, Utah 84111

David A. Gauntlett
James A. Lowe
Andrew M. Sussman
GAUNTLETT & ASSOCIATES
18400 Von Karman, Suite 300
Irvine, California 92612

Attorneys for Plaintiffs/Appellants

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I. ADMIRAL DISREGARDS PLED FACTS POTENTIALLY REQUIRING DEFENSE DUTY

A. Claimants' Allegations of Akävar Purchases, Not its Use, and Resulting Damages Trigger Coverage

Admiral's defense duty is determined by considering not just the limited fact allegations that Admiral likes but all facts pled. "**If one** claim or **allegation triggers the duty** to defend, **the insurer must defend** all claims (that is, covered and non-covered claims) . . . **When in doubt, defend.**" (emphasis added) *Ohio Cas. Ins. Co. v. Cloud Nine, LLC*, 464 F. Supp. 2d 1161, 1166 (D. Utah 2006), citing *Benjamin v. Amica Mut. Ins. Co.*, 140 P.3d 1210, 1216 (Utah 2006).

Admiral spotlights some carefully-culled underlying allegations that the representative plaintiffs used Akävar but did not lose weight. Admiral then asserts plaintiffs seek remedies based solely on their use of Akävar and failure to lose weight, not their purchases prompted by Basic Research's advertisements. [Appellee's Brief ("AB"), pp. 8-10] But other allegations in *Miller*, *Tompkins* and *Forlenza* assert that the representative plaintiffs and class members purchased Akävar in reliance on the statements ("Eat All You Want and Still Lose Weight") in Basic Research's advertisements and plaintiffs seek damages resulting from the purchases – not from product use. [Opening Brief ("OB"), pp. 8-10]

By disregarding these other allegations Admiral reveals that it "can't handle the truth." The disregarded allegations confirm that the underlying lawsuits are about advertising, not breach of warranty. Since claimants' "injury" (paying money to purchase Akävar) allegedly "arose out of" Basic Research's alleged "use of another's

[Western Holdings'] advertising idea in [their] 'advertisement,'" inducing those purchases, potential coverage is implicated and Admiral's defense duty triggered.

Admiral's focus on an isolated allegation that the representative plaintiff tried Akävar but did not lose weight [AB 8-9] incorrectly implies no other facts meeting *Benjamin*'s "one . . . allegation" requirement are pled. As previously noted [OB 6-10; Record on Appeal ("R") 803-805, 901, 1026-1027, 1032-1033, 1035-1036], the *Miller*, *Tompkins* and *Forlenza* complaints contain facts squarely meeting *Benjamin*'s "one . . . allegation" requirement.

Miller seeks certification of a plaintiff class consisting of "all **persons or entities** who or that **purchased** [Akävar] within the United States" (emphasis added), with no requirement that class members "used" Akävar. [R 827] "Entity" class membership requires only Akävar's purchase, not use, because "entities" cannot "use" Akävar [R 827] as they cannot swallow diet supplements and have no weight to lose.

Nor does Admiral consider that the *Tompkins*' class representatives represent those "who **purchased**, not for sale or reassignment, [Akävar] [R 918-919] . . . [and] suffered injury as a result." [R 919] (emphasis added). Again, the consolidated *Miller/Tompkins* classes were certified with no "use" requirement: "Persons who purchased Akävar." *Miller v. Basic Research, LLC*, No. 2:07-CV-871 TS, 2011 WL 818150 at *2 (D. Utah March 2, 2010).

Admiral also disregards *Forlenza*'s allegations that representative plaintiffs Forlenza, Monroe and "I. Bodor" "purchased" Akävar in reliance on the same advertisements alleged in *Miller* and *Tompkins* [R 1014-1015, 1017], and that "I. Bodor"

seeks certification of a plaintiff class "who **purchased** [Akävar]" (emphasis added) excluding *Miller* and *Tompkins* class members. [R 1023-1024] Here too, there is no "use" requirement.

B. Claimants Allege Class "Damages" Resulting Only from Akävar Purchases, Not from its Use

The *Miller*, *Tompkins* and *Forlenza* allegations fall squarely within Admiral's obligation to pay "damages" because of "personal and advertising injury," defined as "injury . . . arising out of" an enumerated offense. [R 37, 47, 97] These elements are met [OB 18-21], triggering potential coverage and Admiral's defense duty. *Cloud Nine*, 464 F.Supp.2d at 1166; *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127, 133 (Utah 1997). Admiral has not and cannot meet its burden of "establish[ing] that" all of the underlying "claims fall outside the coverage of the policy . . . ," *Simmons v. Farmers Ins. Group*, 877 P.2d 1255, 1258, n.3 (Utah App. 1994).

Contending the underlying complaints allege damages caused by Akävar's failure to perform as advertised, Admiral disregards that the complaints seek damages resulting from purchases in reliance on advertisements, **not from product use and failure to perform**. Nor can Admiral do so because the underlying complaints meet *Benjamin*'s "one . . . allegation" test. *Miller* seeks damages for violations of Utah's Consumer Sales Practices Act, Utah Code Ann. §13-11-1 *et seq*. and similar out of state statutes, and for "negligent misrepresentation." [R 843-848, 850-851] "**As a result of** Defendants' . . . negligent **statements** . . . **Plaintiffs and the members of the Class** have been injured and have suffered loss of money and property, and they **are entitled to recover**

damages[.]" [R 846, 850-851, 853] (emphasis added)

Tompkins also alleges plaintiff's and class members' entitlement to "damages" under California's Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code §§ 1750 *et seq.*) which permits an award of "damages" in addition to the "restitution" remedy the claimants separately seek under Cal. Bus. & Profs. Code § 17200 *et seq.* [R 925] These allegations contradict Admiral's attempted conflation of covered "damages" and "restitution" remedies as described below in detail. *See* Section II.B.2.

In *Forlenza* the plaintiffs Forlenza, Monroe and "I. Bodor" allege they "purchased" Akävar in reliance on the same advertisements alleged in *Miller* and *Tompkins*. [R 1014-1015, 1017] The *Forlenza* claimants seek both "individual damages" [R 1018] and damages on behalf of a plaintiff class of "all citizens of California only who purchased [Akävar]" but excluding *Miller* and *Tompkins* class members. [R 1023-1024] Like *Miller* and *Tompkins*, *Forlenza* does not require "product use" as a class membership requirement. Like *Tompkins*, *Forlenza* seeks CLRA "damages" for plaintiffs and the class in addition to a distinct "restitution" remedy for other claims. [R 1029, 1038]

Only Ms. Forlenza, individually, alleges damages "because she purchased a product based on false advertising **and** because the product has not worked as advertised." [R 1014-1015] (emphasis added) But the latter allegation does not eliminate the former allegation as Ms. Forlenza seeks damages based, in part, on purchases inspired by allegedly misleading advertisements.

This Court can conclude as Admiral urges only by disregarding the underlying allegations that refute Admiral's arguments. Doing so improperly permits Admiral to "cobble together the most favorable allegations from both parties and disregard the rest[.]" *Align Tech., Inc. v. Fed. Ins. Co.,* 673 F. Supp. 2d 957, 972 (N.D. Cal. 2009).

C. The Trial Court, Misled by Admiral, Erroneously Presumed All Claimants used Akävar Products

The trial court accepted Admiral's mischaracterizations without citing the underlying complaints' pertinent language. But the above-referenced allegations prove the trial court wrong, as its "no potential coverage" ruling was premised on the same disregard of facts that Admiral now urges. *Benjamin* and *Cloud Nine* prohibit such a blatant disregard of the facts.

II. ADMIRAL MISCHARACTERIZES THE LEGAL DOCTRINES ESTABLISHING POTENTIAL COVERAGE UNDER ITS POLICY

A. Admiral Asserts a "Causation" Requirement Based on the Policy Term "Arising Out Of," Which Does Not Require "Proximate Causation"

Admiral claims it only provides coverage where "the insured committed one of the defined offenses which is asserted to be the cause of the insured's liability for damages." [AB 21, 39] Here, Admiral inaccurately paraphrases the Policy language. It contains no requirement of "proximate causation" between a covered "offense" and "damages." The word "liability" does not even appear in the coverage language. Instead, the Policy requires only that Admiral pay "damages because of 'personal and advertising injury,'" defined as: "injury . . . **arising out of** one or more of the following offenses . . . [including] f. The use of another's advertising idea in your 'advertisement.'" [R 47]

(emphasis added).

Under Utah law, "arising out of" does not require direct proximate causation. Its meaning is broader, including: "originating from," "growing out of," "flowing from," "incident to" or "connected with." *Durbano v. American Empire Ins.*, No. 91-4225, 91-4142, 1992 WL 112246 at *2 (10th Cir. (Utah) 1992) (unpublished), citing *Nat'l Farmers Union Prop. & Cas. Co. v. Western Cas. & Sur. Co.*, 577 P.2d 961, 963 (Utah 1978) (cited by Admiral). The Policy does not require a heightened causal link between the offense (f) and "damages." Instead, "injury" (claimants' payment of money) need only "arise out of" offense (f).

Miller, *Tompkins* and *Forlenza* meet this requirement by alleging their plaintiffs' and class members' purchases "arose out of" (i.e., "originated from" or "flowed from") Basic Research's "advertisement," whose "advertising idea" originated with "another" (Western Holdings or others identified by the Federal Trade Commission). [OB 31-39] No other causal nexus need be alleged to trigger potential coverage.

False advertising is injurious to potential consumers of a product that has been misrepresented whether or not the consumers actually use it. The mere purchase of Akävar, inspired by an "advertising idea" "used" in Basic Research's "advertisement," is a wasted expenditure constituting "injury," and supporting an award of damages.

B. "Damages" Is a Remedy "Because of 'Advertising Injury'"

1. The Theory of Recovery Does Not Require Proximate Cause Analysis

Bank of the West v. Sup. Ct., 2 Cal.4th 1254 (1992) does not support Admiral's construction but clarifies why Basic Research's analysis rings true. The Court held at 1264:

> [T]he policy . . . covers "*damages*" for "advertising injury" caused by "unfair competition." Read in this context, the term "unfair competition" can only refer to a civil wrong that can support an award of damages.

Here, the operative offense is "use of another's advertising idea in your 'advertisement,' " not "unfair competition." The underlying false advertising claims assert civil wrongs that support a damage award. Nothing more need be shown to establish why the "as damages because of 'advertising injury' " provision is satisfied. [R 851, 922, 1014-1015]

The underlying complaints all assert express claims for recovery of damages based on "false advertising." The focus is not on the theory of recovery but on the facts pled which meet the offense's elements. *Butler v. Clarendon Am. Ins. Co.*, 494 F. Supp. 2d 1112, 1132 (N.D. Cal. 2007) ("Coverage is triggered by the offense, not the injury or damage which a plaintiff suffers . . . [for] 'advertising injury liability.'").

2. The Damages Remedy Is Not Altered By Measurement as Money Paid, Nor is the Damage Amount So Limited

Confronted with *Miller's*, *Thompson's* and *Forlenza's* allegations of and prayers for "damages," Admiral wrongly characterizes the sole remedy sought as non-covered purchase price "restitution." [AB 42-43] Not so. The complaints seek "damages" and,

separately, "restitution" as different remedies with entitlement to each triggered by Akävar purchases, not use. (Again, the entity class member purchasers cannot use Akävar.) [R 827, 919, 1014-1015, 1023-1024] The purchases allegedly were prompted by advertised claims that purportedly cannot be true for anybody – not by claims proved untrue on a purchaser-by-purchaser basis. Otherwise the classes would exclude purchasers who did not use Akävar and thus cannot know whether it works for them.

Damages, no matter how measured, **are a distinct remedy** allowed by state "false advertising" statutes pled in the underlying suits. *See*, California Legal Remedies Act ("CLRA"), Cal. Civ. Code §1780(a) (remedies include "actual damages" not less than $1,000 in class actions and, separately, "restitution of property.") It matters not that "damages" can be calculated as sums the class members paid for Akävar. The character of a "damages" remedy is not altered by its calculation. *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 592 (C.D. Cal. 2011) (if damage sum is limited to amount spent to purchase falsely advertised product "the amount of restitution under the UCL and actual damages under the CLRA is the same.") Admiral neither argues nor proves otherwise. Regardless, CLRA damages need not equal restitution amounts. They may be as little as $1,000 for the entire class (Cal. Civ. Code §1780(a)(1); *Delarosa*, 275 F.R.D. at 593) or, for seniors sustaining "substantial physical, emotional or economic damages," as much as an additional $5,000 apiece. Cal. Civ. Code §1780(b).

C. *Noscitur a Sociis* Does Not Limit the Meaning of "Use of Another's"

Admiral's reliance on the *noscitur a sociis* doctrine as a reason to impose a strict proximate cause standard is likewise unpersuasive. The proximity of offense (f), "use of

another's advertising idea in your 'advertisement' " to other separate offenses such as (g), "infringement upon another's . . . slogan," in no way alters the meaning of "use of another's." Admiral does not argue otherwise but nonetheless tries to invoke the doctrine to argue that just as its "liability" to an insured sued for false arrest depends on allegations of proximate causation between damages and "false arrest," so too does Admiral's "liability" to Basic Research depend on allegations of proximate causation between damages and the "use of another's" offense. [AB 19-21] However, the separate offenses do not imply a specific strict proximate cause standard for all offenses.

Additionally, while *noscitur a sociis* may assist in construing the meaning of an ambiguous insurance policy term with reference to other terms immediately surrounding it, ambiguity must be found. *Heathman v. Giles*, 374 P.2d 839, 840 (Utah 1962) (the rule "requires that the meaning of doubtful rules or phrases be determined and take their character from associated words or phrases"). Admiral neither argues that its "use of another's advertising idea in your 'advertisement' " offense is ambiguous nor suggests any alternative meaning based on the other "personal and advertising injury" offenses surrounding it.

Applied Bolting Tech. Products v. U.S. Fid. & Guar. Co., 942 F. Supp. 1029, 1033, n.6 (E.D. Pa. 1996) (applying Vermont law), cited by Admiral, also is not on point. There, the district court ruled the "misappropriation of advertising ideas" offense (not at issue here) was not triggered by a competitor's allegation that the insured had falsely advertised that its product complied with industry standards. "Advertising idea" was held not to include such industry standards. In *dictum* the Admiral-cited footnote contained a

throwaway reference to *noscitur a sociis* without discussion or direct application of the facts.

Applied Bolting's narrow construction of "advertising idea" is also inconsistent with subsequent opinions applying Utah law. In *Cloud Nine*, *supra*, 464 F. Supp. 2d at 1166, an "advertising idea" was held, pursuant to prior authority, to be an "idea for calling public attention to a product or business, especially by proclaiming desirable qualities so as to increase sales or patronage." Judge Campbell determined that false advertising allegations implicate coverage for deceptive trade practice claims under Utah Code Ann. §13-11a-3. *Id.* at 1169 (citing *Elcom Technologies, Inc. v. Hartford Ins. Co. of the Midwest*, 991 F. Supp. 1294, 1298 (D. Utah 1997), reaching the same result in a false advertising case).

D. The Policy Term "Of" Imposes No Claimant Ownership Limit on the "Advertising Idea"

Admiral's arguments are all based on the "straw man" premise that the Policy contains a requirement of proximate causation between "damages" and an offense (whether "false arrest" or "infringement upon another's copyright"). For the reasons argued above and elsewhere [OB 18-21] Admiral's premise is inaccurate, because "[a]rising out of" does not require proximate causation.

As stated in *Amco Ins. Co. v. Lauren-Spencer, Inc.*, 500 F. Supp. 2d 721, 733 (S.D. Ohio 2007):

> Both the Second Circuit Court of Appeals and the Third Circuit Court of Appeals have interpreted the "arising out of" language as requiring the advertising to materially contribute to the injury of creating consumer confusion. But the advertisement does not need to be the only cause of the injury

> to trigger the duty to defend. . . . The phrase indicates a requirement of a causal relationship but not one of proximate cause.

Contrary to Admiral's arguments, the Policy neither provides nor implicitly contemplates that claimants must be "offended" by the "use of another's advertising idea." The component elements of "offense (f)" are not defined in the Policy nor circumscribed by the limited, flawed construction that Admiral asserts (aside from the term "advertisement" whose satisfaction is not contested). Admiral's policy construction is based on the same "inherent in the policy" argument that the Ninth Circuit recently rejected, concluding: "[n]othing in the relevant provision or Kelley's policy as a whole required that the allegedly injurious 'course of advertising' be undertaken by Kelley itself." *Tom Kelley Studios, Inc. v. State Farm Gen. Ins. Co.*, No. 10-55931, 2011 WL 6396441, at *1 (9th Cir. Dec. 21, 2011).

Another state Supreme Court agrees. In *McCormack Baron Mgmt. Servs., Inc. v. American Guar. & Liab. Ins. Co.*, 989 S.W.2d 168, 171-72, 173 (Mo. 1999) the Missouri Supreme Court held:

> The word "offense" cannot be read to limit coverage only to a particular "cause of action" or "claim." [It] simply does not have this meaning in either common usage or legal usage. . . . Coverage could be limited to specific and formal causes of action. . . . Additional cases from other jurisdictions generally support a broad interpretation of the term "offenses" in policies like the one involved here.

Here as in *Kelley*, 2011 WL 6396441, at *1: "[A]t most, the policy language on this point is ambiguous because it is 'susceptible to two or more reasonable constructions.'"

E. Basic Research's Alleged "Use" of Western Holdings' "Advertising Ideas" Triggers a Policy "Offense"

Admiral neither contests the Utah law definitions of "of another" that Basic Research posits nor explains why an alleged consumer harm is insufficient to trigger possible coverage. What is pled suffices to constitute a "use of advertising idea" that results in possible harm, as found in *Cloud Nine*, 464 F. Supp. at 1167, and *General Cas Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 579 (Minn. 2009).

Westfield Ins. Co. v. Robinson Outdoors, Inc., No. 10-151 (JRT/JJG), 2011 WL 5593171 (D. Minn. Nov. 17, 2011), now on appeal, is inconsistent with the Ninth Circuit's *Kelley* approach noted *supra*. That district court failed to explain how a distinct corporate party to a license arrangement with the insured would not be "of another."

This is especially problematic because the phrase "of another" can mean "a different one." "Of" is defined as "**7.** used to indicate possession, connection or association." RANDOM HOUSE UNABRIDGED DICTIONARY 1343 (2d ed. 1993). "Another" is defined as "**5.** a different one; someone different." *Id.* at 85. the word "of" does not limit rights to an "ownership" harm but includes "association" or "connection."

Misconstruing the "use of another's advertising idea in your 'advertisement'" offense by narrowly substituting the phrase "wrongful taking" in contravention of the majority interpretation of "advertising idea" (as well as that adopted by Judge Campbell in *Cloud Nine*), *Robinson* failed to perceive that "of another" can be a distinct entity whose very legal separateness required the license agreement to confirm its rights.

Here, Western Holdings is owned by an entity separate from Basic Research, requiring an arms-length license agreement with Basic Research permitting its use of the trademarked slogans in its "advertisements." [R 670, 808]

III. ADMIRAL'S COVERAGE CASES ARE READILY DISTINGUISHABLE

A. Admiral Cites No Coverage Case Analyzing False Advertising Claims under Offense (f)

Trailer Bridge, Inc. v. Illinois National Ins. Co., 657 F.3d 1135 (11th Cir. (Fla.) 2011) and *Rose Acre Farms, Inc. v. Columbia Cas. Co.*, 662 F.3d 765, 2011 WL 5313818 (7th Cir. (Ind.) 2011) analyzed claims labeled "antitrust," not claims for "false advertising," triggering a defense under Policy offense (f) – "use of another's advertising idea in your 'advertisement.' " Their analysis of offense (f)'s scope is inconsistent with Utah law and not persuasive authority. *Simmons v. Farmers Ins. Group*, 877 P.2d 1255, 1258 (Utah Ct. App. 1994) ("language limiting an insurer's duty to defend an insured must be clear, unambiguous and sufficiently conspicuous in order to give proper notice to the insured of the limits on the duty to defend.") *Trailer Bridge*'s narrow definition of these terms contradicts both Utah and Florida law. *Simmons*, 877 P.2d at 1258, *Pet. for Reh'g*, Case No. 10-13913, 9/27/2011, p. 11.

In *Rose Acre* the Seventh Circuit, *sub silentio*, presumed Rose Acre was advertising its compliance with United Egg Producers' ("UEP's") guidelines during CNA's policy period as a member of the UEP. But Rose Acre was not a UEP member at the time of the initial advertising within the pertinent policy period. The Seventh Circuit's understanding of the facts are contradicted by those revealed in the record. *Pet. for Reh'g*, Case No. 11:1599, ECF No. 40, 11/14/2011, p. 3. This Court can do better.

While these factual errors call into question the outcome in *Rose Acre* (Pet. For Reh'g, Case No. 11:1599, p. 3), the Court's findings distinguish that case from the present facts because Admiral cannot dispute that the involved slogans were "of another" and not from Basic Research's marketing director.

In *Trailer Bridge* and *Rose Acre* the courts also ignored persuasive authority decided under Utah law:

> Certainly Edizone has alleged "use" of those advertising ideas in the Cloud Nine Defendants' advertisements. . . . Edizone alleges a claim under the Utah Truth in Advertising Act, which specifically requires allegations of deceptive trade practices occurring in advertising. "The purpose of [the Utah Truth in Advertising Act] is to prevent deceptive, misleading, and false advertising practices and forms in Utah." Utah Code Ann. § 13-11a-1. Clearly, the crux of a cause of action for violation of the Utah Truth in Advertising Act is advertising.

Ohio Cas. Ins. Co. v. Cloud Nine, LLC, 464 F. Supp. 2d 1161, 1167, 1168 (D. Utah 2006); *Wozniak Travel, Inc.*, 762 N.W.2d at 580 (travel company's use of term "Hobbit" to describe its travel agency capitalized on good will surrounding Tolkien's literary works, so alleged false advertising using that phrase fell within policy); *Ohio Cas. Ins. Co. v. Albers Med., Inc.*, No. 03-1037-CV-W-ODS, 2005 WL 2319820, at *4 (W.D. Mo. Sept. 22, 2005) (pharmaceutical company's use of "Lipitor" to describe its cholesterol-reducing drug alleged to unfairly compete with legitimate producer of same, Pfizer, triggered false advertising coverage).

B. An Offense (f) "Advertising Idea" is Not Limited to a Claimant's "Advertising Idea"

Admiral's policy also does not require that the "advertising idea" originate with the underlying claimant, as federal appellate courts have found. *American Simmental*

Ass'n v. Coregis Ins. Co., 282 F.3d 582, 588 (8th Cir. (Neb.) 2002) (challenged "full-blood" cattle designation "advertising idea" did not originate with claimants); *Native American Arts, Inc. v. Hartford Cas. Ins. Co.*, 435 F.3d 729, 734 (7th Cir. (Ill.) 2006) ("Indian-made" "advertising idea" did not originate with claimant).

Construing the predecessor "misappropriation of advertising ideas" policy language, the Ninth Circuit could not "discern any contextual, public-policy, or logical significance to who owns the legal rights to the advertising idea in question." *Hyundai Motor Am. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 600 F.3d 1092 (9th Cir. (Cal.) 2010). Here too, Admiral's "use" language lacks such "significance." The policy covers an insured's "advertising idea . . . use" and coverage is not limited to the insured's origination of an "idea."

As this court recently reaffirmed in *U.S. Fid. & Guar. Co. v. United States Sports Spec. Assn.*, 2012 UT 3, ¶14, ___ P.2d ___, 2012 WL 192793, Utah courts will not rewrite insurance policies under the guise of policy construction. There is no basis to substitute more narrow policy language than that used by Admiral under the guise of interpretation.

Trailer Bridge, 657 F.3d at 1143 articulated and applied a "concept about the *manner* the product is promoted" as the definition for "advertising idea." In doing so the appellate court disregarded its prior broader definition ("any idea or concept related to the promotion of a product to the public"), without explanation. *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1188 (11th Cir. (Fla.) 2002). *Trailer Bridge* thereby failed to follow its own precedent and disregarded fundamental Florida insurance coverage law

principles. *Creative Hospitality Ventures, Inc. v. United States Liab. Ins. Co.*, 655 F. Supp. 2d 1316, 1329 (S.D. Fla. 2009) ("[An insurer] cannot ask the court to re-write the policy for [them] under the guise of policy construction."). This Court cannot reach *Trailer Bridge*'s result without similarly disregarding *stare decisis* and ignoring Utah's identical prohibition on rewriting policies. *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1275 (Utah 1993).

Similarly, *Rose Acre*'s analysis of the Policy term "of another" differs from Utah's approach. The conclusion that "animal husbandry" concerns were not alleged as a pretext for higher egg prices "in any of the 353 paragraphs of the antitrust complaint" is based on an overly restrictive reading of the underlying fact allegations and was contrary to the district court's factual findings:

> One of the ways that plaintiffs allege that Rose Acre . . . [was] able to conceal their anti-competitive activity was by falsely representing that the reduced egg supply and higher prices were "as a result of husbandry concerns."

Rose Acre Farms, Inc. v. Columbia Cas. Co., 772 F. Supp. 2d 994, 1001 (S.D. Ind. 2011) *aff'd on narrower grounds, Rose Acre Farms, Inc. v. Columbia Cas. Co.*, 662 F. 3d 765 (7th Cir. 2011). The court also failed to consider the Internet pages provided to the insurer which pre-dated Rose Acre's joining UEP and that the district court quoted in *Rose Acre,* 772 F. Supp. 2d at 1002, n.8:

> Eggs from the "free roaming" farms cost much more than regular eggs because the eggs must be gathered by hand from the individual hen's nest.

Concerns with the factual approach of the appellate court, however, do not overcome the reality that the facts of this case differ. Here, the promotional campaign the

insured adopted cannot be treated as if created by Basic Research's own marketing director or retained advertising agency.

Rose Acre's error is also highlighted when considering other Policy provisions that exclude only some forms of "false advertising." Exclusion (g), which eliminates certain forms of "false advertising" for "failure to conform to representations of quality or performance," reveals that coverage for other forms of false advertising is contemplated. Were this not so, the exclusion from coverage for some types of advertising would be unnecessary.

This logic is buttressed by elementary insurance business principles. Construing "of another" to mean "advertising ideas" that the insured did not originate poses a diminished actuarial risk. Insurers need not insure against newly-created advertising concepts whose originality may generate litigation disputes, as is true of those in the "advertising" business falling within exclusion (j)(1).

Rose Acre also failed to consider or address: (1) the possibility that under Indiana law the term "of another" might be ambiguous in this context; or (2) how the policy "construed as a whole" unambiguously restricts "of another's" meaning to "of a claimant." *Pet. for Reh'g*, Case No. 11:1599, p. 9. *Rose Acre*'s analysis is therefore inconsistent with Utah law. *Taylor v. American Fire & Cas. Co.*, 925 P.2d 1279, 1282 (Utah Ct. App. 1996) ("An ambiguity may arise because the parties may attach two or more feasible meanings to a policy's term. . . . If policy language is ambiguous, the ambiguity is resolved against the insurer."). *Rose Acre* could only be correct if the policy language was: "**misappropriation of the claimants'** advertising idea in your

'advertisement' " and misappropriation were limited to a "wrongful taking" other than "misuse."

Here too, Admiral's Policy does not state "of a competitor" or "of another but not of a co-defendant," nor does it disqualify "ideas" of "another" who may be an alleged co-conspirator. The Policy term is "of another's" – without the express limitation Admiral seeks to impose. To duplicate *Rose Acre*'s error of rewriting Admiral's Policy in the guise of construction would be to disregard Utah law. *Alf*, 850 P.2d at 1275.

Arguing for its preferred narrow meaning of "another," Admiral also asserts that Western Holdings, affiliated with Basic Research, cannot be deemed "another." But Admiral fails to dispute or refute that "another" can reasonably mean (and thus under Utah law **must** be deemed to include) numerous other prior users of the advertised phrases at issue, as identified by the Federal Trade Commission. [OB 34-35] Admiral "concedes [the] point by [its] failure to address it in [its] opposition brief." *Misner v. Potter*, 2:07-CV-330 TS, 2008 WL 410128, at *3 (D. Utah Feb. 12, 2008).

C. "Advertising Ideas" are not Limited to Misappropriation

Although *Rose Acre* presumed that the personal and advertising injury offense of "use of another's advertising idea in your 'advertisement'" is limited to a single readily-definable tort, no such tort exists. "What is important is . . . whether that conduct as alleged in the complaint is at least arguably within one or more of the categories of wrongdoing that the policy covers." *Curtis-Universal, Inc. v. Sheboygan Emerg. Med. Servs., Inc.*, 43 F.3d 1119, 1122 (7th Cir. (Wis.) 1994).

Rose Acre also failed to acknowledge or appreciate the significance of the different meanings of "use" and "misappropriation." A wrongful "use" or misuse not "wrongful taking" is implicated. Application of a narrow tort label for the "use of another's" offense contravenes Indiana law and would contravene Utah law. *Pet. for Reh'g*, Case No. 11:1599, p. 5.

Federal pleading rules lead to the same conclusion. *DISH Network Corp. v. Arch Specialty Ins. Co.,* 659 F.3d 1010, 1015-16 (10th Cir. (Colo.) 2011):

> Insurers have 'a heavy burden to overcome in avoiding the duty to defend, such that the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot.' . . . This liberal approach recognizes the reality that 'notice pleading does not contemplate detail and specificity,' . . . and a complaint may initially 'lack detail necessary to conclusively establish the duty[.]

D. Admiral's Other Cases Are Readily Distinguishable

Other cases cited by Admiral add nothing of substance to the analysis. *Clarcor, Inc. v. Columbia Cas. Co.*, No. 3:10-00336, 2010 WL 5211607 , at *12-13 (M.D. Tenn. Dec. 16, 2010) involved an extraordinarily narrow construction of "advertising idea" which Admiral argues if applied here would not trigger the "use of another's advertising idea in your 'advertisement'" offense. [Appellee's Brief, pp. 24-26] Admiral is mistaken because the law governing the insurance policy in dispute in *Clarcor* substantively differs from Utah law.

Curiously, the *Clarcor* court cited no Tennessee decisional law (even though that law was held to govern the policy) but only *Sorbee Int'l Ltd. v. Chubb Custom Ins. Co.*, 735 A.2d 712, 714 (Pa. Super. Ct. 1999). The *Clarcor* court narrowly construed "advertising idea" as:"[A]n idea for advertising that is 'novel and new,' and 'definite and

concrete,' such that it is capable of being identified as having been created by one party and stolen or appropriated from another." *Clarcor*, 2010 WL 5211607, at *12. The *Clarcor* court then found the coverage offense not triggered by the underlying competitor plaintiff's underlying allegations that the insured was advertising its competing goods with packaging designs, colors and a rating system similar to the claimant's on the grounds these things were not "novel." *Id.*

Clarcor thereby improperly limited the offense to the narrowest tort that could fall within its ambit – common law misappropriation. *See Riese v. QVC, Inc.*, No. CIV. A. 97-40068, 1999 WL 178545, at *3 (E.D. Pa. Mar. 30, 1999) (common law misappropriation limited to marketing technique that is "novel," "new" and "concrete."). But "[T]ort law principles do not control judicial construction of insurance contracts . . ." *Creative Hospitality Ventures, Inc. v. United States Liab. Ins. Co.*, 655 F.Supp. 2d 1316, 1329 (S.D. Fla. 2009).

Clarcor is unpersuasive because Tennessee and Pennsylvania law are inconsistent with Utah law, which does not narrowly construe terms not defined in an insurance policy. In *Cloud Nine*, 464 F.Supp. 2d at 1166 (applying Utah law) the District of Utah found that ordinary product trade names are "advertising ideas" because broadly construing the involved terms, the "plain and ordinary meaning of 'advertising idea' generally encompasses 'an idea for calling public attention to a product or business, especially by proclaiming desirable qualities so as to increase sales or patronage.'" Other courts have construed the term identically, *American Simmental Ass'n*, 282 F.3d at 587 (applying Montana law), or more broadly as "any idea or concept related to the

promotion of a product to the public." *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1188 (11th Cir. (Fla.) 2002). Admiral suggests no reason why the terms in its policy should be construed narrowly as in *Clarcor* rather than as construed in *Cloud Nine* or *Hyman*. Basic Research's advertising slogans fall well within an "advertising idea."

Welch Foods v. Nat'l Union Fire Ins. Co., Civ. Action No. 09-12087-RWZ, 2010 WL 3928704 (D. Mass. 2010) , *aff'd*, *Welch Foods v. National Union Fire Co. of Pittsburgh,* 659 F.3d 191, 193 (1st Cir. (Mass.) 2011) is similarly inapposite. An insured's advertisements for its "pomegranate juice" were alleged by a competitor to be false because the juice actually was a blend of juices, not pure pomegranate juice. With *Clarcor*-like narrowness, *Welch* limited the meaning of "advertising idea" to "the manner in which one advertises its goods and does not include the content of such advertising," then found no potential coverage. *Id.* at *4.

Welch's narrow definition of "advertising idea" was not based on applicable Massachusetts law but derived from a string-citation to *Accessories Biz, Inc. v. Linda and Jay Keane, Inc.*, 533 F. Supp. 2d 381, 387 (S.D.N.Y. 2008), which asserted the definition adopted in *J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Massachusetts Bay Ins. Co.*, 818 F. Supp. 553 (W.D.N.Y. 1993), *vacated by reason of settlement*, 153 F.R.D. 36 (W.D.N.Y. 1994). The *Brundage* definition clarified why certain trademark claims could fall within a proposed definition of the distinct term "misappropriation of advertising ideas" – an offense different from the "use of another's advertising idea" offense at issue here. But *Brundage* neither stated nor suggested that its "advertising idea" definition

was intended to apply to other offenses, nor to limit the scope of available definitions in other contexts like those presented in *Miller*, *Tompkins* and *Forlenza*.

Clarcor, *Welch* and *Accessories Biz* each inaccurately and too-narrowly construed "advertising idea." But such construction is contrary to Utah's broad policy construction principles. *U.S. Fid. & Guar. Assoc. v. Sandt*, 854 P.2d 519, 521 (Utah 1993) ("[I]nsurance policies should be construed liberally in favor of the insured . . . so as to promote and not defeat the purposes of insurance."). Applying this principle here, this Court should construe "advertising idea" with the breadth articulated in *Cloud Nine*, *American Simmental* and *Hyman* and, so applying the term, find potential coverage.

IV. EXCLUSION (G) DOES NOT BAR A DEFENSE

Admiral bears the burden of proving its Policy's Exclusion (g) – "'personal and advertising injury' arising out of the failure of goods . . . to conform with any statement of quality or performance made in your 'advertisement'" – "clearly" bars a defense. *LDS Hosp., a Div. of Intermountain Health Care, Inc. v. Capitol Life Ins. Co.*, 765 P.2d 857, 859 (Utah 1988). To do so, Admiral must overcome the "general presumption . . . to the effect that that which is not clearly excluded from the operation of [an insurance] contract is included[.]" *Id.*

Admiral fails to meet its burden. *Clarcor*, *supra*, 2010 WL 5211607, at *13-14 found the "failure to conform" exclusion applicable on distinguishable grounds. There, specific false advertising comparing the underlying claimant's and the insureds' competing products was alleged. The advertisements there at issue expressly focused the insured's product's "quality" and "performance" – "Purolator's claim of "97% overall

filtration efficiency." *Clarcor*, 2010 WL 5211607, at *3. But as previously explained [OB 45-50], such facts are not alleged in *Miller*, *Tompkins* or *Forlenza*.

Westfield Ins. Co. v. Robinson Outdoors, Inc., Civil No. 10-151 (JRT/JJG), 2011 WL 5593171 (D. Minn. Nov. 17, 2011) (presently appealed to the Eighth Circuit) also analyzed the "failure to conform" exclusion in a manner inconsistent with Utah and Minnesota law, under which "[w]here multiple claims are present" Admiral can escape its duty to defend only by showing "that no single claim . . . arguably [falls] within the scope of coverage." *AMCO Ins. Co. v. Inspired Technologies, Inc.*, 648 F.3d 875, 880 (8th Cir. (Minn.) 2011) – an appellate decision that reversed District Judge Tunheim (who decided *Robinson*, 2011 WL 5593171, on which Admiral heavily relies) because extrinsic evidence disposing of **some** otherwise-covered claims based on the insured's intentional misconduct did not dispose of **other** claims in which negligent misconduct liability outside the policy's exclusion could be found.

Robinson also incorrectly decided that an insured's licensed use of an "advertising idea" does not trigger potential coverage even though such allegations evidence the parties' mutually independent legal status, thereby vitiating the notion that the advertising idea is not "of another." 2011 WL 5593171, at *7.

Admiral argues that the underlying claims' "essence" is that claimants "bought the product, took it as directed and didn't lose weight." [AB 44] But self-serving characterizations based on inaccurate paraphrasing cannot supplant the actual underlying allegations which, as Section I above establishes, support damages resulting from Akävar's purchase – **not** from its failure to perform. Since there are facts pled in at least

one claim in each underlying lawsuit that are beyond Exclusion (g)'s scope, the exclusion does not bar a defense to any of the lawsuits. *Inspired Technologies*, 648 F.3d at 883.

Basic Research has established why Admiral cannot meet its burden. [OB 45-50] As shown in Section I, *supra*, the offense at issue ("use of another's advertising idea in your 'advertisement' ") is not alleged to "arise out of" any such "failure to conform" to any statement. Again, that is because the claimants allege a plaintiff class and its members' entitlement to damages because they "purchased" Akävar, not because they tried it and it did not work as advertised.

Admiral's criticism of Basic Research for "parsing" dictionary definitions of words to ascertain the exclusion's meaning is baffling. Utah courts consult lay dictionaries to understand non-defined insurance policy terms as a reasonable lay insured would understand them. *Cypress Plateau Min. Corp. v. Commonwealth Ins. Co.*, 972 F. Supp. 1379, 1384 (D. Utah 1997) ("Ordinarily, a dictionary is a valuable resource for [insurance policy] interpretation."); *Rasmussen v. Western Cas. & Sur. Co.*, 393 P.2d 333, 337 (Utah 1964). As Basic Research predicted, [OB 46-47] Admiral offers no different definitions of Exclusion (g)'s terms than the dictionary definitions Basic Research provides.

Total Call Int'l., Inc. v. Peerless Ins. Co., 181 Cal. App. 4th 161, 172 (Cal. App. 2010) requires no different result. There, the insured's competitors alleged the insured's phone cards did not provide the number of call minutes advertised. Exclusion (g) applied because a covered offense (implied "disparagement" of competitors' phone cards) allegedly "arose out of" the phone cards' "failure to conform" to their advertised quality.

For the same reason the exclusion applied in the other cases cited in Admiral's lengthy *Total Call* quotation. [AB 34-35]

But where (as here) the offense allegedly "arises out of" something other than the products' actual efficacy (e.g., the "goods" were purchased without regard to whether they worked as advertised), the exclusion is not triggered. *Infor Global Solutions (Michigan), Inc. v. St. Paul Fire & Marine Ins. Co.*, 686 F. Supp. 2d 1005, 1007-08 (N.D. Cal. 2010) (exclusion inapplicable because lawsuit for implied defamation of competitor through negative comparison of insured's and competitor's products in insured's advertisements had nothing to do with whether the insured's own products possessed their advertised attributes).

Nor do the cases cited in *Total Call* on which Admiral relies support its arguments. In *Skylink Technologies, Inc. v. Assurance Co.*, 400 F.3d 982, 984 (7th Cir. (Ill.) 2005), the insured falsely advertised its garage door opener controls were compatible with a competitor claimant's garage door openers. The court found the infringement was not caused by advertising that created colorable liability but rather the manufacture, use and sale of the infringing product. Unlike here, the underlying claimant failed to mention any specific advertisements in its lawsuit. Given those underlying allegations the court held that merely posting a manual on a website and employee recommendations that customers obtain additional product information from it did not constitute advertising.

In *New Hampshire Ins. Co. v. Power-O-Peat, Inc.*, 907 F.2d 58, 58-59 (8th Cir. (Minn.) 1990), coverage was denied because a competitor's allegations that the insured

mislabeled its manure's contents triggered a policy exclusion for: "incorrect description or mistake in advertised price of good[s] . . . advertised" – an exclusion different from Admiral's "failure to conform" exclusion. In stark contrast, here claimants seek damages "arising out of" their advertisement of a product, not because the product did not conform to statements about it.

Superperformance Int'l, Inc. v. Hartford Cas. Ins. Co., 203 F. Supp. 2d 587, 589-590 (E.D. Va. 2002) is equally unpersuasive. There, a competitor sued the insured manufacturer of sports cars and related products for infringing the "Shelby" and "Cobra" trademarks. A defense was denied primarily because the "first publication exclusion" (inapplicable here) barred a defense. It was also held that Exclusion (g) barred a defense to any "false advertising" claim. But that bare conclusion was unsupported by discussion, analysis or explanation. *Superperformance* is not applicable where, as here, a competitor is not suing and a mark is not at issue.

Moreover, Admiral's interpretive theory broadly construes this exclusion in contravention of Utah law. An exclusion must bar a defense in all possible worlds. *Jewelers Mut. Ins. v. Milne Jewelry Co.*, No. 2:06-CV-243 TS, 2006 WL 3716112, at *3 (D. Utah Dec. 14, 2006) (unpublished) (Exclusion (g) ambiguous as applied to "Navajo Jewelry"); *Elcom*, 991 F. Supp. at 1298 (Exclusion (g) inapplicable where product not alleged to rise to level advertised in terms of "quality or performance.").

V. CONCLUSION

For all the above reasons Judge Dever's ruling should be reversed and Admiral found to owe a defense to Plaintiffs in the *Miller, Tomkins* and *Forlenza* actions. This

case should be remanded to quantify Basic Research's damages and prejudgment interest, and for entry of judgment requiring Admiral to defend Basic Research in the ongoing consolidated *Miller/Tompkins* case.

Dated: February 7, 2012

By: _____
Alan C. Bradshaw
Aaron C. Garrett

MANNING CURTIS BRADSHAW & BEDNAR LLC
10 Exchange Place, 3rd Floor
Salt Lake City, Utah 84111

David A. Gauntlett
James A. Lowe
Andrew M. Sussman
GAUNTLETT & ASSOCIATES
18400 Von Karman, Suite 300
Irvine, California 92612

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

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1. This Reply Brief compiles with the type-volume limitation of Utah R. App. P. 24(f)(1) because this Brief contains 6,955 words and does not use monospaced face type.

2. This Brief complies with the typeface requirements of Utah R. App. P. 27(b) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 13 point, Times New Roman.

Dated: February 7, 2012.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 7, 2012, a true and accurate copy of the foregoing document was served, via First Class U.S. Mail, postage prepaid, upon the following:

Phillip S. Ferguson
CHRISTENSEN & JENSEN, P.C.
15 West South Temple, Suite 800
Salt Lake City, Utah 84101-1572

David J. Garthe
BOORNAZIAN JENSEN & GARTHE
555 12th Street, Suite 1800
Oakland, CA 94607-4046

Attorneys for Defendant/Appellee